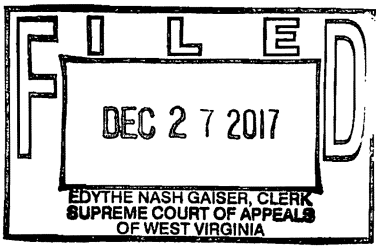
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17-0616



CARL CLARK,

Petitioner, Plaintiff Below,

v.

KANAWHA COUNTY BOARD OF EDUCATION,

Respondent, Defendant Below.

(FROM THE CIRCUIT COURT OF KANAWHA COUNTY, NO. 15-C-1470)

PETITIONER'S REPLY BRIEF

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In reply to respondent's brief, petitioner submits the following:

I. SUMMARY OF REPLY ARGUMENT

Respondent took not one, but two adverse employment actions against petitioner. First, respondent improperly declared his position as "vacant", thus terminating him. Second, despite the discretion to do otherwise, respondent manipulated the timing of petitioner's termination, the posting of the position as vacant, the interviews of candidates, and the remainder of the hiring process so as to ensure that it could not re-hire the petitioner as coach. In other words, while respondent argues its hands were tied by then-existing law so that it could not legally have re-hired the petitioner, petitioner's argument (supported by the evidence of record) is that respondent manipulated the sequence of events in order to tie its own hands.

None of respondent's witnesses explicitly admitted discriminatory intent in doing these things. However, because intent is subjective, the issue of discriminatory animus should have been submitted to a jury.

II. REPLY ARGUMENT

A. Respondent Improperly Terminated Petitioner's Contract of Employment as Coach.

The respondent declared petitioner's head coaching position as "vacant" in April, 2015, which terminated petitioner's employment more than two months prior to the expiration of his existing coaching contract. The contract at issue provides, in pertinent part, that petitioner and respondent "mutually agree . . . that the Employee shall perform the following extra-curricular duties during the ***school year 2014-2015***: BOYS BASKETBALL HEAD CHS . . ." Joint Appendix ("J.A."), at 192. (emphasis added). The West Virginia school year is defined to run from July 1st of one year to June 30th of

the next. *W. Va. Code* § 18-1-2; *W. Va. Code of State Rules* § 126-73-4.9. The agreement also states: "Payment . . . shall be made upon completion of duties of the extra-curricular assignment or upon such other schedule mutually agreed upon by the parties." Finally "Employee retirement, resignation, or termination ends this agreement." This agreement was not signed until after petitioner's retirement as a teacher.[1]

Respondent' brief argues respondent did not breach this contract because (1) petitioner did not include a claim of breach of contract in his complaint; (2) respondent paid petitioner in full for his services for the 2014-2015 school year in April, 2015, which ended the contract; (3) petitioner admitted in his testimony as well as in responses to requests for admission that he was not employed in any capacity by respondent either when he applied for or when he interviewed for the position; and (4) because petitioner did not assert termination of the contract prior to the end of the school year in response to respondent's motion for judgment as a matter of law. None of these assertions rebut the fact that respondent terminated the petitioner prior to the end of his 2014-2015 coaching contract, and petitioner did preserve his position below.

First, it was unnecessary to plead a breach of contract in the complaint, for the very reason that petitioner was paid in full for the 2014-2015 school year. The evidence of

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[1] In relation to the timing of the execution of this agreement, respondent makes several assertions about what former CHS principal Giles did and the reasons for those actions, particularly that Giles "made the decision to allow Clark to continue to coach after Clark's retirement from teaching for a finite period of time" and "just for the 2014-2015 basketball season." See, Respondent's Brief, at pp. 4 and 5. However, Giles did not testify at trial and none of the citations to the record support the assertions made in respondent's brief. The only reference that comes close actually merely references respondent's counsel's musings about what Giles might have been thinking. See, J.A., at 257. Cody Clay, the athletic director, testified that regardless of when the 2014-2015 coaching contract was actually signed, Clark was employed as a certified professional teacher and basketball coach at the beginning of the 2014-2015 school year, and Clark's resignation as a teacher during the 2014-2015 school year did not cause respondent to declare the coaching job as vacant before the basketball season began. J.A., at 159.

respondent's breach of contract was not submitted to seek payment for the 2014-2015 school year (because there was no payment due). The fact of the breach is still important evidence in relation to the respondent's motives.

Second, by its own terms, the contract did not end at the end of the basketball season, and payment of the full amount of the compensation by respondent did not make the contract end at the end of the basketball season. The contract states "Payment . . . shall be made upon completion of duties of the extra-curricular assignment" but the same sentence immediately continues "or upon such other schedule mutually agreed upon by the parties." Nowhere in the contract is it stated that full payment ends the required duties. In this case, it is undisputed that there were, in fact, additional duties to be performed by the coach before the end of the 2014-2015 school year (June 30, 2015) – notably several weeks of practice and scrimmage in June, 2015. Respondent's own brief admits these required activities existed on at least three occasions. See, Respondent's Brief, at 6, 22, and 29. The timing of payment of the compensation is irrelevant in light of the undisputed existence of additional duties to be performed.

Third, respondent is correct that the petitioner admitted at trial and in responses to requests for admission that when he applied for the head coaching position and interviewed for the head coaching position, he was not currently employed by the respondent. However, these admissions do not establish that respondent did not breach petitioner's contract because the respondent had ***already*** terminated petitioner's employment by posting the job as vacant in the first place.

Fourth, counsel for petitioner did argue in response to the motion for directed verdict before the trial court that respondent's position was improperly declared vacant and

should not have been posted as open by respondent before June 30, 2015, the conclusion of petitioner's coaching contract. See, J.A., at 245, 247, 252, and 264.

For these reasons, respondent's contention that it did not improperly terminate petitioner's coaching contract is completely inaccurate.

B. THE EVIDENCE ADDUCED AT TRIAL WAS SUFFICIENT TO GIVE RISE TO MULTIPLE CONCLUSIONS BY A TRIER OF FACT. ACCORDINGLY, THE CASE SHOULD HAVE BEEN SUBMITTED TO THE JURY.

"The appellate standard of review for the granting of a motion for [judgment as a matter of law] pursuant to Rule 50 of the West Virginia Rules of Civil Procedure is de novo. On appeal, this court, after considering the evidence in the light most favorable to the nonmovant party, will sustain the granting of [judgment as a matter of law] when only one reasonable conclusion as to the verdict can be reached. But if reasonable minds could differ as to the importance and sufficiency of the evidence, a circuit court's ruling granting [judgment as a matter of law] will be reversed." Syl. pt. 3, *Brannon v. Riffle*, 197 W. Va. 97, 475 S.E.2d 97 (1996). This appeal has been filed because reasonable minds could differ as to the importance and sufficiency of the evidence and this case should have been submitted to the jury.

From 1971 to 2014, petitioner was employed by the respondent as both a certified professional educator as well as a coach. It took plaintiff twenty-three years of working his way up as a very successful coach at lower levels and as an assistant before attaining the coveted position of men's basketball head coach at Capital High School. J.A., at 20. His predecessor had been coach for many years before voluntarily ceasing coaching. J.A., at 21. Coach Clark ultimately served as boys' basketball head coach at CHS for twenty-one years. J.A., at 21, 23. In other words, this was a coveted job that did not come open

very often. Petitioner's position at trial was that Cody Clay, the very young new athletic director at CHS, used the confusion of an unexpected principal change at CHS in the middle of the 2014-2015 school year to force Coach Clark out of as head coach in order to hire a younger person in the position. J.A., at 247, 248.

At trial and in its response brief, respondent repeatedly focuses on the simple argument that its "hands were tied" at the time of re-filling the coaching position because, by law, employed certified professional teachers (which the new, under 35 hire was) were given preference over non-employed certified professional teachers (which petitioner was due to his recent retirement). This argument ignores the timing and sequence of the respondent's declaration of the coaching position to be vacant in the first place; the posting of the job as available; the deadline for interviews to be completed and the deadline for the position to be filled - all of which reasonable minds could have found were manipulated in order to force the petitioner out to replace him with a younger employee. Petitioner submitted evidence of all the following:

He was 68 years of age when the two adverse employment decisions were made in relation to his coaching position; that he was replaced by a 35 year old; that *every* new basketball coaching hire at CHS during the relevant year was under the age of 40 and that *every* person that participated in the interview and recommendation panel for basketball hires were under the age of 40. Further, petitioner's evidence showed:

Coach Clark told Cody Clay at the end of the basketball season in March, 2015, that he wished to keep his position as head coach going forward, and Clay did not tell him there was any problem in doing so. J.A., at 30, 31, 162.

Cody Clay did not inform Coach Clark that he could avoid the job ever being posted as vacant if he simply became re-hired as a teacher. The coach hiring policy provides "Certified teachers may hold a coaching position indefinitely, ***without advertising***, contingent upon the recommendation of the principal and approval of the board." J.A., at 205. (emphasis added). In the absence of a requirement to post the position, then principals do not post the jobs as available "as long as he doesn't commit some immoral act or do something crazy." J.A., at 127-128.

Cody Clay knew the preferential hiring law regarding employed certified professional teachers had been repealed effective June 12, 2015, but pressed forward with hiring a candidate based solely on that policy four days prior to the change. J.A., at 165.

Cody Clay knew or should have known that the school year (and thus petitioner's coaching contract) ended on June 30, 2015, subsequent to the repeal of the preferential hiring rule that kept petitioner from being considered to be re-hired for the position. J.A., at 192. Principal Bailey admitted it is improper to post a job as open until it is actually vacant. J.A. at 84. Despite all this, Clay caused the position to be declared vacant and advertised as open more than two months early.

Cody Clay did not inform Coach Clark in advance that his coaching job would be declared vacant or posted as open, or that, since it was being posted, Clark could avail himself of the preferential hiring rule by getting re-hired even as a substitute teacher. J.A., at 161, 162, 169[2].

Once petitioner was terminated, he re-applied for the position. There were several applicants. Per Principal Bailey, Cody Clay instructed the panel that Matthew Green, a 35

[2] Being on the "sub list" would once again have made petitioner an employed, certified professional educator.

year old applicant, was the only applicant who could be considered to be offered the position. J.A., at 93-94. Clay denied this at trial, causing a significant inconsistency on respondent's evidence. J.A. at 167. Clay's statement also wasn't correct, and it impacted the chances of Beatty, another applicant who was not barred by the preferential hiring rule. J.A. at 167.

Principal Bailey testified he told Cody Clay that he wished he did not have to replace petitioner, the longstanding head coach, within just weeks of Bailey assuming the principal's position, but Clay did explain that there was any other choice. J.A., at 83, 84, 88. Principal Bailey also testified that Clay informed him the position had to be filled within 30 days of it being posted. J.A., at 83. Clay also denied this at trial, causing another significant inconsistency in respondent's employees' testimony. J.A. at 167. In fact, no such requirement existed. J.A., at 81, 82.

Cody Clay prepared a set questions to ask each applicant. J.A., at 87. These questions included the following: "What are your career goals as a basketball coach? Where do you see yourself in five years? What kind of commitment can you give us if you were given this position?" J.A., at 204. Clay admitted he wanted a firm future commitment of that nature, demonstrating discriminatory animus on the basis of age. J.A., at 171-2.

Respondent's employees ultimately admitted that there was no prohibition from either waiting to fill the position until after the rule change on June 12 or conditioning the re-hiring of Coach Clark upon him once again becoming employed as a certified teacher with the County (J.A., at 134, 135).

The respondent and its witnesses denied any discriminatory animus in their actions decision making. However, to have a triable issue reach a jury on a discrimination claim

in this state it is not required that plaintiff elicit a direct, blatant confession of discrimination. In light of the admissions and inconsistencies above, a reasonable jury ***could*** have found that the respondent manipulated the process in order to replace petitioner with a much younger employee.

CONCLUSION

After considering the evidence in the light most favorable to the petitioner, the nonmoving party, the Circuit Court's granting of respondent's pre-verdict motion for judgment as a matter of law under Rule 50 must be reversed, because there are multiple different reasonable conclusions as to the verdict that could have been reached based on the evidence adduced at trial.

Respectfully submitted this **26th** day of **December, 2017**.

CARL CLARK,

By Counsel,

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KANAWHA COUNTY BOARD OF EDUCATION,

Respondent, Defendant Below.

(FROM THE CIRCUIT COURT OF KANAWHA COUNTY, NO. 15-C-1470)

CERTIFICATE OF SERVICE

I, Todd A. Mount, counsel for the petitioner, Carl Clark, do hereby certify that a true and correct copy of **"Petitioner's Reply Brief"** was served upon counsel of record this **26th** day of **December, 2017**, by depositing the same in the U.S. Mail, postage pre-paid, to the following:

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